

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIAIN RE MCKESSON GOVERNMENTAL  
ENTITIES AVERAGE WHOLESALE  
PRICE LITIGATION

No. C-09-80170 MISC MHP (JCS)

**ORDER GRANTING MOTION TO  
COMPEL [Docket No. 1]****I. INTRODUCTION**

Defendant McKesson Corporation's Motion to Compel came on for hearing on Friday, October 30, 2009, at 9:30 a.m. For the reasons stated below, the Defendant's Motion is GRANTED.

**II. BACKGROUND****A. The Litigation**

On May 20, 2008, the San Francisco City Attorney and the San Francisco Health Plan ("SFHP") filed suit against Defendant McKesson alleging violations of various statutes, including the Racketeer Influenced Corrupt Organizations Act (18 U.S.C. §1962) and the California False Claims Act (Cal. Gov. Code § 12651). The lawsuit is pending in the District of Massachusetts. The lawsuit involves published prices for brand-name prescription drugs. In particular, Plaintiffs allege that Defendant McKesson and First Databank ("FDB") entered into a scheme by which the published Average Wholesale Price or "AWP" for prescription drugs was artificially increased from 20% to 25%. Defendant's Motion to Compel ("the Motion") at 4. Plaintiff alleges that although FDB represented that the published AWP was a weighted average of the list price of the three national drug wholesalers – McKesson, Cardinal Health and AmerisourceBergen – this representation was untrue. Instead of constituting an average of the three, FDB's published AWP's were based on McKesson's list prices alone. *Id.* According to Plaintiffs, this resulted in the State of California overpaying for over 400 brand-name prescription drugs beginning in August 2001 up until the present. *Id.* On April 29, 2009, the district court entered a protective order that governs the

1 confidentiality of documents produced in the litigation by both parties and nonparties. *See*  
2 Declaration of Paul Flum, ¶ 2, Exh. F.

3 In July 2009, Plaintiffs moved to certify the action as a class action comprised of all  
4 governmental entities in California including “the State itself.” Motion at 3. In support of the class  
5 certification motion, the Plaintiff submitted a declaration from its damages expert, who “estimated  
6 the damages to be approximately \$550 million, 90% of which is attributable to injuries allegedly  
7 suffered by California’s Medicaid program. CDHCS is the state agency responsible for overseeing  
8 and operating California’s medicaid program.” Flum Decl., ¶ 4

9 In addition, in 1998, Ven-A-Care filed a *qui tam* suit on behalf of California. The Judicial  
10 Panel on Multidistrict Litigation transferred that case to the District of Massachusetts to include it as  
11 part of that court’s AWP MDL litigation. *See In re Pharm Indus. Average Wholesale Price Litig.*,  
12 478 F.Supp.2d 164, 170 (D. Mass. 2007). In that case, the State of California filed a complaint-in-  
13 intervention (in 2005) “alleging that the manufacturer defendants provided inflated AWP’s to FDP,  
14 which FDP published and Medi-Cal then used to reimburse providers for certain prescription drugs.”  
15 Defendant’s Motion at 4. According to Defendant, CDHCS “as the state agency responsible for  
16 Medi-Cal, has been the focal point for discovery in the Ven-A-Care litigation.” *Id.* In response to  
17 document requests in that case, CDHCS put over one million documents into a central database that  
18 is maintained by Bridge City Legal, and then produced some of those documents to the Ven-a-Care  
19 defendants. *Id.* at 5.

#### 20 **B. The Defendant’s Motion to Compel**

21 The Defendant’s Motion to Compel arises out of a subpoena that Defendant served on  
22 CDHCS for the production of documents, many of which were produced in the related AWP  
23 litigation. The subpoena seeks the following documents:

24 Request No. 21: “For each litigation matter, not responsive to Request No. 20, concerning  
25 AWP or prescription drug reimbursement: (a) All transcripts of depositions of you and Your  
26 current and former employees; (b) All exhibits to depositions of you and Your current and  
former employees; and (c) All Documents produced by You in discovery.

27 *See* Flum Declaration, Exhibit A at 11.  
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1 In response to the subpoena, CDHCS served objections on May 7, 2009. *See* Flum Decl.,  
2 Exh. B. CDHCS did not file a motion to quash the subpoena. In response to Request No. 21,  
3 CDHCS objected as follows:

4 DHCS objects to this request on the basis that “all documents produced” is vague,  
5 ambiguous and overbroad because some of those documents are defendant-specific or subject  
6 to a protective order that the documents produced can only be viewed in connection with the  
7 Ven-A-Care litigation. Without waiving the above objections, due to the volume of materials  
8 and the search required to locate the responsive documents, the burden of producing the  
9 materials is overwhelming. Pursuant to Federal Rules of Civil Procedure, Rule 45,  
subdivision (c)(3)(A)(iv), DHCS will disclose this information if an appropriate cost-shifting  
arrangement can be agreed upon. An estimate of the cost obtained from Bridge City Legal is  
\$10,190. There may be additional costs to the extent other redactions or special treatment of  
documents is required. DHCS also reserves the right to review the documents and to assert  
further objections if necessary.

10 *Id.* at 13-14.

11 According to Defendant, CDHCS indicated in its response to other document requests that it  
12 had previously produced in the Ven-a-Care litigation, documents that were responsive to those  
13 requests. According to CDHCS, the documents produced in the Ven-a-Care litigation would be  
14 produced to McKesson “if an appropriate cost-shifting arrangement can be agreed upon.” Flum  
15 Decl., Exh. B, Response to Request Nos. 1, 2(e), 5, 7, 10, 14-16 and 19. The parties met and  
16 conferred and “agreed that if McKesson gets CDHCS’s document production in the Ven-a-Care  
17 litigation, most of its requests would be fulfilled.” Flum Decl., ¶ 7. CDHCS agrees that the  
18 documents produced in the Ven-a-Care litigation “are the subject of the instant dispute.” CDHCS’s  
19 Opposition at 2, *citing* Gorospe Decl., ¶ 3.

20 The dispute, therefore, centers around CDHCS’s stated need to re-review all of the  
21 documents that were produced in the Ven-a-Care litigation before producing them again in this  
22 litigation to Defendant McKesson. CDHCS claims that it needs to conduct this re-review because  
23 some of the documents are subject to the deliberative process privilege and other documents contain  
24 confidential pricing information, which are trade secrets. *Id.* CDHCS estimates that this review of  
25 the entire document production would cost approximately \$250,000 and constitutes an  
26 overwhelming burden, especially in light of the difficult budgetary times in the State of California.  
27 Defendant claims that this review, and related expense, is completely unnecessary because these  
28 documents were already produced in another litigation, and any confidentiality concerns may be

1 ameliorated by an appropriate protective order such as was done at the time of the initial production  
2 in the MDL litigation and was also done here in this litigation.<sup>1</sup>

3 In its Motion, Defendant first argues that the documents it seeks are highly relevant given the  
4 substantial overlap in subject matter between the two actions. Fed. R. Civ. P. 26(b)(1). Defendant  
5 next challenges CDHCS's assertion of the deliberative process privilege. Defendant argues that  
6 CDHCS has waived the deliberative process privilege when it produced the documents pursuant to a  
7 protective order in another case. Defendant argues that even if the privilege has been preserved,  
8 these documents are not protected by the deliberative process privilege because CDHCS has not  
9 satisfied the requirements for protection from disclosure under the privilege. Third, Defendant  
10 asserts that CDHCS should be required to produce these documents because the deliberative process  
11 privilege is a qualified privilege and Defendant's need for the documents at issue outweighs any  
12 harm that may be caused by their disclosure. Finally, Defendant argues that the protective order in  
13 the underlying litigation will adequately protect CDHCS's confidentiality concerns.

14 In its Opposition, CDHCS does not argue with Defendant's assertion of relevance or dispute  
15 its need for the documents. Rather, CDHCS argues that it has properly asserted the privilege and  
16 has not waived it. CDHCS argues that it was ordered to produce the documents in the Ven-a-Care  
17 litigation; therefore, the ruling requiring it to release privileged information pursuant to protective  
18 order does constitute a waiver. Opp. at 5. CDHCS also asserts that it only produced deliberative  
19 process information and trade secret information under a protective order for use in that litigation  
20 only, and to be reviewed by attorneys only. CDHCS's Opp. at 4-5. CDHCS argues mainly that the  
21 burden of reviewing the entire production again is enormous, both in terms of time and cost. Citing  
22 FRCP 45(c)(3), CDHCS argues that it should not be required to bear such a large cost, given that it  
23 is not a party to this litigation.

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28 <sup>1</sup>The protective order in the underlying proceeding entered by Judge Saris on April 29, 2009, is  
"modeled after and almost identical to the protective order entered in the MDL proceeding."  
Defendant's Reply at 4, *citing* Flum Decl., Exh. F.

1 **III. ANALYSIS**

2 **A. Waiver**

3 Defendant asserts that CDHCS has waived the deliberative process privilege in two ways: 1)  
4 CDHCS failed to assert the deliberative process objection in its initial response to request number  
5 21(c) of Defendant's subpoena; and 2) CDHCS voluntarily produced the documents in another  
6 litigation, thereby waiving the privilege. The Court agrees.

7 In determining whether or not a party has waived a privilege, courts look to the following  
8 factors, developed in the context of inadvertent waiver: "(1) the reasonableness of the precautions to  
9 prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery;  
10 (4) the extent of the disclosure; and (5) the 'overriding issue of fairness.'" *Eureka Financial Corp. v.*  
11 *The Hartford Accident and Indemnity Co.*, 136 FRD 179, 184 (E.D. Cal. 1991) (holding that blanket  
12 assertion of privilege resulted in waiver where party invoking privilege failed to assert the privilege  
13 as to specific documents even after motion to compel was filed and where dispositive motions date  
14 was fast approaching).

15 Here, CDHCS failed to assert the deliberative process privilege in its response to Request  
16 No. 21 of the subpoena, nor did it file a motion to quash the subpoena on deliberative process  
17 privilege grounds.<sup>2</sup> Rather, CDHCS stated that it reserved the right to raise objections at a later date.  
18 Flum Decl., Exh. B at 14 (CDHCS "reserves the right to review the document [sic] and assert further  
19 objections if necessary.") The response did not identify specific documents that were privileged.  
20 CDHCS's initial blanket assertion of the deliberative process privilege was clearly insufficient to  
21 invoke the privilege in that it failed to identify any specific documents – or even, specific requests –  
22 for which CDHCS invoked the privilege.

23 With respect to the second argument, Defendant is correct that CDHCS has already produced  
24 these same documents, pursuant to a protective order, in a similar case. The order "requiring  
25 disclosure" of the documents in the Ven-a-Care case cited by CDHCS does not indicate that CDHCS  
26 was actually ordered to produce documents. *See* Ballard Decl., Exh. A, November 5, 2008 order.  
27 Defendant points out that the order cited by CDHCS was directed to the U.S. Department of Health  
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<sup>2</sup>CDHCS did raise deliberative process as an objection to Requests 5 and 7. CDHCS also raised this privilege in a blanket general objection.

1 and Human Services and that it pertains to a case *United States of America ex rel. Ven-A-Care of the*  
 2 *Florida Keys, Inc.*, No. 06-11337-PBS a case to which CDHCS is not a party. Reply at 2. Indeed,  
 3 the Order cited went through specific documents one by one and ordered the United States to  
 4 produce documents based on, inter alia, the court's application of the limited protections of the  
 5 deliberative process privilege to these specific documents. The Court finds that CDHCS provided  
 6 the documents in the Ven-a-Care litigation voluntarily. CDHCS voluntarily disclosed the  
 7 documents without taking reasonable precautions to avoid disclosure of privileged information. As  
 8 such, the privilege has been waived. *See Alpha I, supra* at 290. CDHCS's cover letter  
 9 accompanying the document production in that case, purportedly reserving the right to later raise  
 10 privilege objections in subsequent litigation does not change this analysis. *See e.g., In re Worlds of*  
 11 *Wonder Securities Litig.*, 147 F.R.D. 208, 211-12 (N.D. Cal. 1992).

12 The Court finds that CDHCS's deliberative process privilege has been waived with respect to  
 13 the documents at issue.

#### 14 **B. Assertion of Deliberative Process Privilege**

15 Even if the deliberative process privilege has not been waived, it cannot be sustained based  
 16 on the showing made by CDHCS.

##### 17 **1. Applicability of FRCP 45(c)(3)**

18 As a threshold matter, CDHCS argues that under Rule 45(c)(3)(A), "privileged and other  
 19 protected matters" are prohibited from disclosure. CDHCS's Opp. at 3. CDHCS argues that this  
 20 Court should exercise its discretion under Rule 45(c)(3)(B)(i) to deny disclosure of the confidential  
 21 trade secret and commercial information at issue here. CDHCS also invokes the protections of Rule  
 22 45(c)(3)(C), which allows a court to order "reasonabl[e] compensat[ion]." *Id.* at 4.

23 Relying on a case from the Northern District of New York, *Abrams v. General Electric Co.*,  
 24 1998 WL 52035 (February 2, 1998, N.D. N.Y.), Defendant argues that CDHCS cannot invoke the  
 25 protections of Rule 45(c)(3) due to the fact that it failed to file a motion to quash the subpoena.  
 26 Defendant's reliance on *Abrams* is unpersuasive. Rule 45(c)(2)(B) provides that a person subject to  
 27 a subpoena may serve objections (as was done here). Once objections have been filed, the  
 28 responding party need only produce documents if ordered by a court on motion. Rule  
 45(c)(2)(B)(ii). In that case, "the issuing court *may*, on motion, quash or modify the subpoena" if it

requires the disclosure of, *inter alia*, trade secret or other confidential information. Rule (c)(3)(B) (emphasis supplied). This subsection gives the court discretion to modify or quash a subpoena in order to protect “a person subject to or affected by a subpoena.” *Id.*

## 2. Overview of the Deliberative Process Privilege

The deliberative process privilege has been developed to protect “the decision making processes of government agencies.” *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150 (1975). As the Court explained in *NLRB v. Sear Roebuck & Co.*, “the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.” The underlying premise of the privilege is that agency decision-making might be impaired if discussions within the agency were subject to public review, thereby discouraging “frank discussion of legal or policy matters.” *Id.*

In order to be protected by the deliberative process privilege, a document must be both “predecisional” and “deliberative.” *Assembly of the State of California v. United States Department of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). The Ninth Circuit has adopted the D.C. Circuit’s definitions of these terms:

A “predecisional” document is one “prepared in order to assist an agency decisionmaker in arriving at his decision,” . . . and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency” . . . . A predecisional document is a part of the “deliberative process,” if “the disclosure of the materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.”

*Id.* (quoting *Formaldehyde Inst. v. Department of Health and Human Services*, 889 F.2d 1118, 1122 (D.C.Cir.1989) (citations omitted)).

Factual material generally is not considered deliberative, but the fact/opinion distinction should not be applied mechanically. *Id.* at 921-922. Rather, the relevant inquiry is whether “revealing the information exposes the deliberative process.” *Id.* at 921. Thus, for example, in *Quarles v. Department of the Navy*, the court held that cost estimates prepared by a special study team of the Navy which were formulated to assist the Navy in selecting a “homeport” for an intended battleship ground, fell under the deliberative process privilege. 893 F.2d 390 (D.C. Cir. 1990). The Court explained:



cost estimates such as these are far from fixed. . . . They derive from a complex set of judgments - - projecting needs, studying prior endeavors and assessing possible suppliers. They partake of just that elasticity that has persuaded courts to provide shelter for opinions generally.

*Id.* at 392-393. On this basis, the Court declined to order the Navy to produce the full report of the study team. *Id.* (The Navy had produced a redacted version which included only the “truly factual information” and omitted all analysis, conclusions and cost estimates). *Id.* Even where material in a document is purely factual, it may be protected under the deliberative process privilege if it “is so interwoven with the deliberative material that it is not severable.” *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

Generally, the deliberative process privilege may be invoked only by the agency head after personally reviewing the documents for which the privilege is asserted. *See United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998) (citing to *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 516-517 (D. Del. 1980)). As the court explained in *Coastal Corp.*, “[t]hat requirement was designed to deter governmental units from too freely claiming a privilege that is not to be lightly invoked . . . by assuring that some one in a position of high authority could examine the materials involved from a vantage point involving both expertise and an overview-type perspective.” *Id.* at 517. The requirement that the privilege be invoked by the agency head need not be applied absolutely literally. *Id.* at 517-518. However, the duty to invoke the privilege cannot be delegated so far down the chain of command that purposes of the requirement are undermined. *Id.*

The deliberative process privilege is not absolute. *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Even if the deliberative process privilege applies, a litigant may obtain discovery of protected material if the need for the documents outweighs the governmental interest in keeping the decision making process confidential. *Id.* “Among the factors to be considered in making this determination are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *Id.*

Finally, the privilege “must be strictly confined within the narrowest possible limits consistent with the logic of its principles.” *K.L. v. Edgar*, 964 F. Supp. 1206, 1208 (N.D. Ill. 1997)



(citations omitted); *see also United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998) (stating that deliberative privilege is “narrow privilege” which should not be “indiscriminately invoked”).

### 3. Application of the Deliberative Process Privilege

CDHCS has not provided privilege logs listing the documents for which they assert the deliberative process privilege. In fact, CDHCS does not address any specific documents in their Opposition. Instead CDHCS makes a generalized objection, arguing that “in the Ven-A-care litigation, documents reflecting internal discussions and analysis by DHCS were the subject of discovery.” Opp. at 4. This is insufficient. *See e.g., Alpha I, L.P. v. United States*, 83 Fed.Cl. 279, 290 (Fed. Cl. 2008) (“Defendant’s prior assertion of the privilege with respect to documents previously requested by plaintiffs . . . does not sufficiently address the circumstances of this case. Nor are declarations filed in other cases sufficient to support defendant’s prior assertions of the deliberative process privilege. Defendant has not stated with particularity exactly what information sought by plaintiffs’ request for deposition testimony is privileged . . .”) (internal citations omitted).

In order to invoke the privilege, there are several requirements, none of which is met here. For example, CDHCS should have provided a declaration from an agency head that includes the following information with respect to each document for which the deliberative process privilege is asserted: 1) specific facts demonstrating why each document is “deliberative” and “predecisional”; 2) specific facts concerning: a) the degree and type of harm that would result from requiring production of each document; and b) what type of protective order would be necessary to reduce that harm or, alternatively, why a protective order would not reduce this harm; and 3) what portions of each document are deliberative and, if specific sections are purely factual, why those sections cannot be produced. Without this information, the Court cannot determine whether the documents at issue are deliberative or predecisional. Nor can the Court adequately assess the harm that would result if production is ordered. *See e.g., L.H. v. Schwarzenegger*, 2008 WL 2073958, \*7 (E.D. Cal. May 14, 2008 (finding waiver of deliberative process privilege where no declarations supporting privilege were filed).

CDHCS argues that it should not be required to meet its burden due to the enormous cost of the document review in this case. CDHCS argues that it, as a state agency, should not be compelled to conduct a document review at its own expense in order to satisfy its burden to demonstrate that

1 certain documents are privileged. CDHCS cites no authority for the proposition that a state agency  
2 can avoid its initial burden to satisfy the requirements for invoking the deliberative process privilege  
3 simply by arguing financial burden.

4 The burden of articulating the basis for the assertion of the deliberative process privilege is  
5 with the party asserting the privilege. *Alpha I, supra* at 288 (“the party seeking to invoke the  
6 deliberative process privilege has the burden of justifying its application.”). CDHCS has not met its  
7 burden.<sup>3</sup>

### 8 C. Confidentiality Concerns

9 As an initial matter, the Court is not convinced that the materials produced in the Ven-a-Care  
10 litigation, and now sought by Defendant here, are as sensitive as CDHCS suggests. For example,  
11 CDHCS admits that the documents produced in the Ven-a-Care litigation are last least five years  
12 old; therefore, any pricing information contained within these documents is outdated at this point.  
13 Flum Decl., Exh. C, e-mail from counsel for CDHCS Brenda Ray to counsel for Defendant  
14 McKesson, dated June 5, 2009 (“The Ven-A-Care matter collected documents from 1985 through  
15 2006 into a central database at Bridge City Legal, but documents produced were only for the period  
16 1994-2004.”)

17 CDHCS also has failed to explain why a protective order limiting disclosure of these  
18 documents would not eliminate any harm that might result from ordering their production. The  
19 Court finds that the protective order that is currently in place, will sufficiently protect CDHCS’s  
20 interests. *See Price v. County of San Diego*, 165 F.R.D. 614, 620 S.D. Cal. 1996) (concluding that  
21 documents at issue should be produced and noting that “the infringement upon the frank and  
22 independent discussions regarding contemplated policies and decisions by the County . . . can be  
23 alleviated through the use of a strict protective order”).

24 Pursuant to that protective order, a party (or nonparty) may designate documents either  
25 “confidential” or “highly confidential” (also referred to as “attorney’s eyes only”). The latter  
26 designation, specifically includes “trade secrets” and “current and past . . . methods, procedures, and  
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28 <sup>3</sup>This is a particularly apt conclusion in light of the next issue that the Court would have to  
address if the privilege applied: Whether Defendant’s need for the documents outweighs the harm that  
would result from their disclosure. The Court cannot even begin to assess this issue in light of the  
CDHCS’s failure to assert properly the deliberative process privilege.

1 processes relating to the pricing of pharmaceuticals.” Flum Decl., Exh. F, Protective Order at 2-3.  
2 The protection is sufficient.

3 In addition, the Court agrees with Defendant’s proposal of the procedure utilized by the court  
4 in *Tessera, Inc. v. Micron technology, Inc.*, No. C-06-80024-MISC-JW (PVT), 2006 U.S. Dist.  
5 LEXIS 25114 (N.D. Cal., March 22, 2006). There, the court: 1) ordered the documents produced  
6 with the designation, “Confidential – Outside Attorney Eyes Only”; and 2) imposed on the  
7 subpoenaing party the burden of notifying third parties and obtaining their permission to use  
8 documents that were produced. *Id* at \*25-26. The Court finds that the procedures used by the court  
9 in *Tessera* resolve CDHCS’s confidentiality concerns.

#### 10 **D. Financial Burden**

11 In addition to the enormous cost of re-reviewing the documents for privileged  
12 communications, CDHCS argues that it should not be required to pay for the production costs. The  
13 Court has rejected CDHCS’s first argument, concluding that: 1) CDHCS cannot avoid a review of  
14 relevant documents for privilege by arguing burden and 2) no such re-review is required given that  
15 CDHCS has waived the privilege when it voluntarily produced the documents in another litigation.  
16 With respect to the second argument, however, the Court agrees. The Court therefore orders  
17 Defendant McKesson to pay for the costs charged by Bridge City Legal of copying and producing  
18 the documents in electronic form.

#### 19 **IV. CONCLUSION**

20 For the reasons stated above, the Court GRANTS Defendant’s Motion to Compel with  
21 respect to all documents produced in the Ven-a-Care litigation. CDHCS shall produce those  
22 documents on or before Friday November 13, 2009. All such documents shall be confidential  
23 pursuant to the April 29, 2009 Protective Order, shall be disclosed as “Confidential – Attorney’s  
24 Eyes Only” and shall not be used in a deposition or other proceeding without permission from the  
25 competitive entities, or further Order.

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1 In addition, Defendant is ordered to pay for the costs of duplication and production.

2 IT IS SO ORDERED.

3 Dated: November 4, 2009

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JOSEPH C. SPERO  
United States Magistrate Judge